APPENDIX F

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUMES

COPY

TRIAL COURT CAUSE NO. 03-0895

UNION CARBIDE CORPORATION, Movant,	)	IN THE JUDICIAL PANEL
VS.	)	ON
AUDREY AMELIA ADAMS, ET AL., Respondents.	)	MULTIDISTRICT LITIGATION

MOTION FOR TRANSFER

DECEMBER 12, 2003

On the 12th day of December, 2003, the following proceedings came on to be heard in the above-entitled and numbered cause before the Judicial Panel on Multidistrict Litigation, JUDGE DAVID PEEPLES, Presiding, JUSTICE ERRLINDA CASTILLO, JUSTICE MACK KIDD, JUSTICE GEORGE C. HANKS, AND JUSTICE DOUGLAS S. LANG, held in the Third Court of Appeals, Austin, Travis County, Texas:

Proceedings reported by machine shorthand.

MARY ORALIA BERRY, CSR, RPR
224TH DISTRICT COURT
SAN ANTONIO, TEXAS 78205

OFFICIAL COURT REPORTER
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ALSO PRESENT: **MR. CHRIS GRIESEL,** Supreme Court Rules Attorney

CHRONOLOGICAL INDEX

VOLUME 1

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PROCEEDINGS

DECEMBER 12, 2003

FRIDAY

(9:00 a.m. Before the Court.)

(Defendant's Exhibits 1 and 2 marked.)

MR. GRIESEL: All rise. O ye, O ye, O ye, the Honorable, the judicial panel on multidistrict litigation of the state of Texas is now in session. All persons having business before the judicial panel are admonished to draw near and give their attention for the Court is now sitting. God save the state of Texas and this Honorable Court.

Be seated, please.

JUDGE PEEPLES: Good morning and welcome to the first session of the multidistrict litigation panel of Texas. I want to begin by introducing this panel. I'm Judge David Peeples from San Antonio. To the far right, from the 13th Court of Appeals in Corpus Christi, is Justice Errlinda Castillo.

JUSTICE CASTILLO: Good morning.

JUDGE PEEPLES: Next to her from the Third Court of Appeals in Austin is Justice Mack Kidd. Next to me is Justice George Hanks of the First Court of Appeals in Houston, and on the far left from the

Fifth Court of Appeals in Dallas is Justice Doug Lang.

We've allocated 90 minutes per side. Each side is responsible for keeping their internal use of the 90 minutes the way they want to. We will let you know when you've used your time.

Mr. Tipps will have the right to open and close. If anybody feels they need to say something and interrupt from where you are, just be sure the court reporter knows and is told who you are. Tell her your name. Hopefully, only the person who has the floor will need to talk.

We'll take a break roughly halfway through the morning. We are aware of the objections that have been made, and we are aware that there's a difference between an identified defendant and an unidentified defendant. One of the objections dealt with that.

Mr. Tipps, you may proceed.

MR. GRIESEL: May it please the Court. Petitioner's argument will be presented by Mr. Tipps and Mr. Elliston.

MOVANT'S ARGUMENT BY MR. STEPHEN TIPPS

MR. TIPPS: May it please the Court. The motion before the panel this morning seeks to have transferred to a single statewide pretrial court three

cases that have been filed against Union Carbide since September 1, 19 -- September 1, 2003. Because of the tagalong provisions contained in Rule 13, the granting of that motion would effectively automatically transfer as well some 20- or 30-odd additional cases that have been filed against Union Carbide since September 1, and depending upon the breadth of the Court's order, other asbestos cases that have been filed against other defendants but not Union Carbide since September 1. And, of course, over time, -- by reason of the tagalong provisions, the docket of the pretrial court would grow.

However, by the time these newly filed cases are developed and ready for trial, the pretrial court would have had the opportunity to take several steps that would streamline the way asbestos litigation is handled in Texas. Let me offer some examples.

One thing that the pretrial court could do in the near term is to issue a statewide standing order that establishes consistent ground rules for the way in which asbestos litigation is handled. It seems to Union Carbide that just as we have a single set of Rules of Civil Procedure that govern civil actions generally, we should have a standard set of rules that

govern asbestos litigation, a set of rules that provides for master discovery for the different types of asbestos litigation, premises, products; a standing order that establishes consistent rules for when experts have to be designated, for how far in advance of a trial setting plaintiffs have to be produced for deposition; standard rules concerning what has to be accomplished in order to be entitled to a trial setting. We don't have that under the current system.

Under the current system, we have standing orders in some, but not all, of the heavily impacted counties and -- but none of those are consistent. It seems to us that there's no reason to have one set of rules for the handling of asbestos litigation in Dallas County and another set of rules for the handling of asbestos litigation in Travis County. So one thing the pretrial court could do in the near term is work with the parties and develop a statewide standing order that would apply to all asbestos litigation.

Another thing that the pretrial court could do in the near term is to consider and decide a number of unsettled and recurring legal issues that come up in these cases time and time again. There are many examples. Let me mention two.

My client, Union Carbide, pleads a defense under the bulk supplier or a raw materials supplier doctrine. A related issue is currently pending before the Supreme Court. When the Supreme Court decides *Humble Sand & Gravel v. Gomez*, we'll have a better idea about the scope of the bulk supplier doctrine, but that decision is not likely going to resolve all issues. Union Carbide thinks it would be efficient for a single pretrial court to consider its defense and to rule on it one way or the other. That's a lot more efficient, that makes a lot more sense than having that issue decided time and time again by multiple courts.

Another example is the motion that a codefendant called Garlock has repeatedly filed in asbestos cases across the state. It's a motion to strike certain scientific evidence concerning whether chrysotile asbestos causes mesothelioma on the basis that, according to Garlock, the epidemiological studies don't satisfy the *Havner* standard. There's no reason that multiple judges should have to decide whether or not that's a good motion to strike.

Another example, the pretrial court in the near term could oversee new discovery that defendants in asbestos cases are going to be required

to conduct because of the changes in the pro
responsibility rule that were made by House
As the panel on data is aware, under the new
proportionate responsibility standards, defen
designate responsible third parties and have
faults submitted to the jury. But defendants
making that designation also have to present e
of fault on the part of those responsible thir
parties.

We're talking in this case, in
litigation, about bankrupt asbestos defendants
Johns-Manville. We're talking about large emp
whose fault heretofore was irrelevant because o
workers' comp bar. Discovery needs to be conduct by
defendants to try to develop that evidence. Th
pretrial court can oversee that discovery, make s
that it's done in an efficient and timely way s t
it can be used in multiple cases.

If the pretrial court to which t
panel assigns newly filed asbestos cases used t xt
six, eight, or ten months to do those things, b
time any of the cases that are affected by this
motion -- all being newly filed cases -- by the
any of those cases have been on file long enoug be
trial-ready, we could have in place in Texas a

streamlined system for handling asbestos litigation that would be more convenient for the parties and the witnesses than our current system, that would be more efficient, and perhaps more importantly, that would be more just for both plaintiffs and defendants. That's what we're asking the Court to do, and that's all we're asking the Court to do.

The alternative is to continue with the system that we currently have, which we quite frankly believe is less convenient, less efficient, and less just than the system that we could have now that we have multidistrict litigation on a statewide basis available under Rule 13.

We are not here saying that the current system has totally broken down. It has not. Judges and lawyers on both sides of the bar have over the past few years cobbled together a system which involves standing orders in some, but not all, of the most heavily impacted counties pursuant to which cases get filed, most cases get settled, a handful of cases get tried. But it's not a system that is as efficient as it could be, and it's not a system that is as just as it should be.

Let me offer the panel just a few examples of the problems that we believe exist under

the current system that can be corrected with statewide multidistrict litigation. The first concerns duplicative discovery. Under the current system, Union Carbide and other defendants repeatedly are required to respond to the same discovery. At Tab 6B of the appendix that we have filed with the panel, we've included an affidavit of a Baker Botts legal assistant where she summarizes the repetitive discovery that Union Carbide received in a short period of time from a number of plaintiffs' firms for which it then had to respond, and much of that discovery was filed in counties with a standing order.

The current system is also deficient with regard to the way in which oral depositions are handled. The same experts appear in these cases time and time again, and they are deposed time and time again, and time and time again they give the same testimony. We have offered examples of that at Tab 8 of our appendix.

There's no good system for deposing key witnesses only once and having that testimony be available in all cases. We have recounted in our brief, and attached the papers at Tab 7 of our appendix, our experience in presenting John Myers for deposition. Mr. Myers was the head of Union Carbide's

Calidria plant in California where it mined [illegible] asbestos. He was there for a long period of [illegible] He is our key fact witness. He knows what happened. He's now 74 years old. A year or so ago, Waters & Kraus wanted to take his deposition, and we proposed that his deposition be taken in all Waters & Kraus cases, and they said no. As a result, we undertook to cross-notice his deposition in all of the cases Waters & Kraus had. They filed motions to quash the cross-notices. Some of those motions were set for trial. At the end of the day, we came to an agreement.

That all could have been accomplished much more efficiently if a single judge had had all the cases. And the agreement that we came to is only an agreement with regard to Waters & Kraus. A single judge could bring great efficiency to the way in which we handle asbestos litigation.

The plaintiffs in their response have made much of the fact that we have county-wide standing orders in place, and that solves the problem. But it doesn't. We have county-wide orders in ten counties. We don't have a county-wide order in Galveston County where there are over 200 cases pending against Union Carbide. We don't have a

standing order in Brazoria County where there are over 140 cases pending. And even in those ten counties, the scope of the standing orders necessarily is only county-wide; in some places, it's not even that.

In Dallas County, the County Court at Law No. 4 judge has opted out of the Dallas County standing order. And so in Dallas County where we purportedly have a standing order, we really have two sets of rules. In Nueces County, there are four different standing orders in four different courts, and they're all different. And perhaps most significantly, none of the standing orders in the ten standing-order counties are consistent.

We've prepared a handout that's been distributed to the members of the panel in which we tried to summarize in short form the ways in which the standing orders differ. For example, the deadlines for offering a plaintiff for deposition in Bexar County are 120 days before trial. In Dallas County, it's 60 days before trial. Harris County allows discovery -- allows no discovery beyond the master discovery without leave of court. Jefferson County allows cases -- case-specific written discovery.

In Cameron County, there's no provision concerning the maximum number of plaintiffs that can

be joined in a single suit. In Dallas County, the limit is ten. In Tarrant County, it's five. In El Paso, it's three. It would be far better if we had a single statewide standing order negotiated by both sides of the bar and finally decided by the pretrial court that had a consistent set of rules so that litigants practicing in different parts of the state, as all of these litigants do, would know what the rules are.

We also run into the problem of inconsistent rulings. The best example I can offer is the experience that our codefendant, Garlock, has had with its motion to strike scientific evidence that chrysotile asbestos does not cause mesothelioma based upon their argument that the epidemiological studies don't meet the *Havner* standard. That same motion was filed and granted in Bexar County. It was filed and denied in several other counties.

And the Bexar County example provides -- or the Bexar County experience provides a perfect example of how the current system doesn't work. In Bexar County, this motion was filed, considered by Judge Speedlin, a day-long hearing. She read the epidemiological study. She read the affidavits. And on the morning of trial, she granted

the motion.

The plaintiffs took the position initially that they still had evidence to present the jury, began the voir dire examination. Halfway through the voir dire examination, decided that upon reflection, they needed a continuance and asked the judge if they could have the right to file a motion for reconsideration of her ruling. Garlock, for whatever reason, agreed to that; so did the judge. She continued the case, gave it a new trial setting, motions for reconsideration.

On the eve of the hearing of the motion for reconsideration, the plaintiffs nonsuited the case in Bexar County, refiled it in El Paso County, at which point, Garlock filed a motion with the El Paso County Court asking that court to honor Judge Speedlin's order on this motion citing all of the case principles. That motion was denied, effectively denying the motion to strike the scientific evidence.

So here in the *Gilcrease* case, we have an example of inconsistent rulings on the same motion in the same case. It's the same motion. It's the same evidence. It's the same legal standard. And we ought to have one consistent ruling: Either the motion is a good motion or it's not. And with

proceedings, the pretrial court could decide that motion. That ruling could then be appealed, and we would know whether or not that's a good motion.

Let me just address a handful of other issues. Waters & Kraus in their response have taken the position that all Union Carbide seeks here is to delay the proceedings. That argument, though, overlooks the very basic fact that Rule 13 applies only to cases filed after September 1.

Many of the cases that are the subject of Union Carbide's motion, either the three cases that were identified in particular or the tagalong cases, are cases in which service has not even yet been completed. None of those cases is ready for trial. And as I outlined before, in the next six, eight, or ten months, a pretrial court can take steps to make the development and trial of those cases much more efficient and not introduce any delay in the system at all.

The plaintiffs have also questioned Union Carbide's motives in filing this proceeding and asked, "Well, there's been a federal MDL for 12 years. Why hasn't Union Carbide been filing this kind of number of motions in the federal MDL?" The answer is that Union Carbide became a target defendant in

asbestos litigation less than two years ago when the previous targets went bankrupt, and it found itself in the cross hairs of the plaintiffs' guns. Since that time, Union Carbide has become much more aggressive in seeking to defend itself in the courts. One primary thing it's done is to file these motions, to file the Rule 13 motion and to file the corresponding Rule 11 motion with the presiding judges.

The plaintiffs also make much of the fact that, "Well, no asbestos defendant heretofore has filed motions under Rule 11; therefore, there must be something suspect about Union Carbide filing this motion under Rule 13." The answer to that, of course, is that Rule 13 offers advantages that were never offered by Rule 11.

Rule 11 is regionally oriented. It doesn't offer the kind of coordination that we can have with a single statewide judge. Yes, we have sought to, and now, once we decided to invoke Rule 13, we also decided to invoke Rule 11 in order to bring all the asbestos cases under better order. But Rule 13 offers advantages that did not exist in Texas before September 1.

Second, let me address a couple of arguments that are made by plaintiffs' lawyers in an

effort to carve out from this proceeding certain their cases because basically they say their cases are different. And let me first talk about the response that's been filed by my good friends at the Franklin, Cardwell & Jones firm who represent a number of oilfield workers in asbestos litigation.

Franklin, Cardwell & Jones filed a response with this panel to our Rule 13 motion in which they made the argument that their oilfield worker cases were different from traditional asbestos cases, and, therefore, they should somehow be carved out. I have since learned, though, from Mr. Jones -- and I'm sure he will tell the Court exactly what I'm about to say is true -- that Franklin, Cardwell & Jones has quit filing oilfield worker cases. They quit filing them on July the 1st, 2003, because they concluded that as a result of the changes in the proportionate responsibility rules, those cases were no longer viable.

All of the Franklin, Cardwell & Jones cases, therefore, are pre-July 1, 2003 cases. They would be affected by the Rule 11 motions that we have filed in our pre-September 1 cases, but those motions are pending not before this panel, but before the presiding judges.

Franklin, Cardwell & Jones has, and certainly is fully entitled, to make their arguments that their cases should be carved out of the Rule 11 proceedings. We oppose those arguments. I'm not going to go into our opposition now because I don't think it's relevant. But the fact I want to make sure this panel understands is that this panel's decision under Rule 13, concerning whether or not to transfer post-September 1 cases to a single pretrial court, won't affect any of the Franklin, Cardwell & Jones oilfield worker cases because they don't have any post-September 1 cases.

The other carve-out argument I want to address is one made by Waters & Kraus in its response in which that firm begins the response by pointing out two cases of clients of theirs who have mesothelioma from which they will die tragic deaths in the relatively near term, and they complain that those plaintiffs are being prejudiced by our Rule 13 proceeding. Again, those are pre-September 1 cases.

The cases that this panel has jurisdiction over, the cases that this panel can order transferred to a single pretrial judge, none of those cases are trial-ready. They're all brand-new cases. And by the time those cases get trial-ready, there

will be a new set of procedures under which they can be tried. And for that matter, the pretrial court is probably in a better position to determine whether or not there are special circumstances affecting certain cases that require those cases to be given priority in trial.

The final point I want to make relates to arguments that have been made by the plaintiffs with regard to the fact that asbestos is described by many commentators as a mature tort. The plaintiffs in their responses confuse the concept of a mature tort with the concept of a mature case. We are not talking about any mature cases here because all of these cases are newly filed. Moreover, there's no authority for the proposition that just because asbestos litigation involves a mature tort, at least in some senses, that it's not appropriate for coordinated pretrial proceedings.

Whether or not the issues in a typical asbestos case have already been resolved in earlier court decisions, there still are significant scheduling problems that we have with a number of asbestos cases pending in Texas that can be addressed constructively by a single pretrial judge. And more importantly, as I've said previously, not all the

issues are resolved. The bulk supplier raw material supplier issue has not been resolved. Issues concerning the evidence that both sides want to offer through expert witnesses and whether that meets the *Havner/Robinson* standards, those issues have not been resolved.

I expect that you're going to hear from Mr. Budd, if he says what he said before in some of these Rule 11 hearings, that Union Carbide wants to relitigate all of the issues that have already been decided in asbestos litigation. That's not the case. Union Carbide, and I think the other defendants, want to litigate before a single pretrial judge issues that have not been decided that need to be decided in order to streamline the way in which asbestos litigation is handled in Texas.

And, of course, finally, there's the issue of the proportionate responsibility statute, which involves new discovery that needs to be conducted and perhaps even new legal issues that need to be resolved, and a pretrial court would offer the perfect opportunity to do that.

I have covered the opening remarks that I want to make. Mr. Elliston, do you have anything to add?

MR. ELLISTON: I have nothing to add at this time. I would reserve my time for rebuttal, if I may.

MR. TIPPS: Unless the panel has questions, I have nothing further.

JUSTICE LANG: I do have a question.

MR. TIPPS: Yes.

JUSTICE LANG: Do you have any suggestions about where your side of the argument would like to see the cases consolidated or coordinated?

MR. TIPPS: I've not made that suggestion, or I've not undertaken to make any such suggestion because it has been my understanding that that was not a suggestion that the panel was seeking from the litigants. So we defer to the panel in that regard.

JUSTICE LANG: Thank you.

JUSTICE CASTILLO: Do you seek a statewide pretrial court and not regional coordination?

MR. TIPPS: Yes, because that's what is contemplated under Rule 13. Were it not for Rule 11, I don't think we would even be thinking in terms of regional coordination with regard to any cases.

But it seems to me that the advantages that we seek are far better achieved if we have a single judge deciding all cases consistently across Texas rather than the system that was available under Rule 11, which would have envisioned regional judges who, yes, might be required to coordinate their activities with each other. But it seems to us that it would be better if we had a single judge.

And we had some question before I began about evidence or exhibits. And the evidence or exhibits that we tender for the panel's consideration are the materials that we have previously filed, which consist of the appendix to our consolidated reply, and then supplemental materials that we filed on December 5th. And since I'm not quite sure whether I'm in an appellate court setting or a trial court setting, I don't know whether to treat that as the record, which is already before the panel, or exhibits that I need to offer. So if I need to offer them, I offer them.

JUDGE PEEPLES: The exhibits that you already have on file, is there any objection to having the panel admit those by anybody? They're before the Court.

MR. TIPPS: Thank you, Your Honor.

MR. GRIESEL: May it please the
Respondents' arguments will be presented first
Ms. Sharon McCally, then by Mr. Russell Budd,
Mr. Mike Kaeske, then by Mr. Greg Jones, and
Mr. Charles Siegel.

RESPONDENTS' ARGUMENT BY MS. SHARON MCCALLY

MS. MCCALLY: May it please the
Your Honors, as the staff has indicated, my name
Sharon McCally, and I'm the first speaker on be
those plaintiffs who have claims pending that h
been injured by asbestos substances. And in my
before the Court, it has been my intent to discu
Rule 13 and why Union Carbide has not met the cr
for a Rule 13 court. But before I reach that poi
have to respond quickly to a -- what I perceive i
complete change in position from Union Carbide.
Because as this Court is well aware, we've already h
two hearings in which Union Carbide has argued the
merits of motions pending under Texas Rules of
Judicial Administration Rule 11.

Now, today what I'm hearing is t
Union Carbide is before you treating Rule 13 in a
vacuum, not asking you to consider in any way Rul
and how the proceedings will interact between e
other. They're not asking any longer, I believ

statewide consolidation of all asbestos litigation designated by them. This is a complete shift in Union Carbide's position. And the reason that it's significant in what this Court is obligated to do today is because the criteria for assigning a Rule 13 judge requires that the appointment of this judge promote just and efficient resolution of these cases and that it serve the convenience of the parties.

Now, that convenience of the parties criteria is a new one because that was not an element under Rule 11. It is an element under the MDL rule, Section 1407 of 28 U.S.C., because Rule 13 is modeled after the MDL statute. So the reason that it's important that they appear to have abandoned this position is that in order for this Court to determine whether or not an MDL judge could be appointed to promote the just and efficient resolution of the three cases for which Union Carbide filed this motion, is not to consider that function in a vacuum, but to consider how these cases will function in unison with all of the other asbestos litigation that was filed before September the 1st of 2003. And in the hearings that we've heard before, what Union Carbide has been telling you is that they're trying to get statewide consolidation because they think it would be a good

idea if one judge decided all of these issues once and for all.

Now, there are several problems with what they're suggesting, not the least of which probably has caused the abandonment of that position, but it's not something this Court can ignore. It's because now they have, in essence, gone under Rule 11 and asked for the appointment of eight separate regional administrative judges in order to hear the pre-September litigation, which has been ongoing for all of this period of time, and because they have emphasized so heavily the necessity for the Rule 11 judges to consult with a Rule 13 judge, this Rule 13 proceeding is not in a vacuum. And you do not consider whether or not a Rule 13 judge would promote just and efficient conduct of litigation in a vacuum.

You can't say, for example, as Mr. Tipps is suggesting: Would it be a good idea for one judge to hear all of these issues that have been raised, because that one judge is then consulting with eight -- potentially eight other judges? So you have to consider what they're asking for in context.

I think they have recently observed, maybe they understand now, that Rule 11 consolidation and a statewide judge appointed under Rule 11 is not

possible. I think they're conceding that now. Therefore, there could be potentially eight se[illegible] judges. And as I've said, with that obligati[illegible] consult, you cannot by the appointment of a Ru[illegible] judge obtain one ruling on the issues they're t[illegible]g about. And I want to step back for just a minut[illegible]nd talk about the issues that they're saying shoul[illegible]e handled in that quick six-to-eight-month period of time with this new Rule 13 judge.

They told you that they want a s[illegible]ary judgment heard on the question of the adequacy [illegible] the warnings under the bulk supplier defense. Well, there's two critical problems with that. There [illegible]n't any way that they will be able to, under the current Texas Rules of Civil Procedure, advance a motion for summary judgment in the first six months of the litigation without affording any of the parties an opportunity for discovery. Because what they're not telling you is that all of the bulk supplier mot[illegible]ons for summary judgment and all of the bulk supplier cases that are pending in the appellate courts n[illegible]w, depended on an evidentiary record. These are not motions as a matter of law, again, in a vacuum. There's going to have to be an evidentiary record developed.

And so what is the Rule 13 judge going to be doing in order to move the ball down the court to get to the point that Union Carbide is talking about taking six or eight months? It's going to be appointing a liaison committee, which is contemplated under Rule 13; going to be re-creating master discovery, which is specifically contemplated under Rule 13, notwithstanding the fact that all of these parties have been operating under agreed discovery for years. These are all the things that are going to have to happen before that motion for summary judgment that Union Carbide so desperately wants to have heard can even be considered.

And why have they waited so long? Why haven't they brought that issue before the courts in the litigation that's been pending today? It has been an issue. They've had the capability under Texas Rule of Civil Procedure 166. Why have they waited until House Bill 4 to get a Rule 13 proceeding to press this issue? It's not a new issue, neither is *Havner-Robinson*. These expert qualification issues are not new issues.

How can the Rule 13 judge at the inception of new litigation leapfrog over what has been going on in Texas state courts for the last 25

years to reach an issue not previously litigated by Union Carbide? They haven't been pursuing these issues.

So the fact that they have an interest in moving forward with these legal issues available to them at all times doesn't meet the criteria of Rule 13. And it rings really hollow, I should say, to suggest that an MDL court could move quickly on that when the Rule 11 judge has just been contemplated, an order hasn't issued yet. That is something that might be presented to the new Rule 11 judge in the Fourth Administrative Region, but it certainly could have been presented to every Texas court that has had this asbestos litigation since asbestos litigation began in the state of Texas, which is a long time ago. And, again, the reason this is important is not because you're deciding a Rule 11 proceeding, but because you are deciding a Rule 13 motion.

I have provided to the Court copies of the federal court cases that we relied upon in our briefing that I hope will give the Court some guidance. It is the smaller bound version. As we've indicated in the brief, because Rule 13 is brand-new, we don't have any authority to guide us in how to apply it. But one thing we do know is under the

posted instruction and from the federal and ap
courts, as you know, is that when there's a fe
statute that looks just like the new state sta
borrow from the federal courts. We look to se
they've been handling it.

And Section 1407 is not new in th
system. And so these cases are from the judici
panel for multidistrict litigation, and they ar
designed to assist the Court in evaluating whe
not it would be a good idea, whether or not it
legally appropriate under the criteria set for
Rule 13, to appoint a Rule 13 court.

And what those cases say is that yo
can call it a mature tort. You can call it anything
you want to. But when litigation has been ongo
a significant period of time, that is a central t
in denying multidistrict litigation treatment for th
reasons that will be covered extensively by my
colleagues, who will go through the history of
asbestos litigation and explain how the system ha
been working in the federal multidistrict litig
and how the system has been working so efficient
the Texas state courts.

Even Union Carbide doesn't bring
raging fire. All they can bring to you is they

they believe, and they hope that changing the face of asbestos litigation in the state of Texas will serve the interests that are outlined in that rule. The rule does not suggest that a hope or a belief or a wish is enough. They suggest that Union Carbide must bring you evidence to show that these criteria will be fulfilled, and they cannot, and they have not done that.

As Mr. Tipps has argued, the fact that they have come to this cross-notice process for establishing uniformity in depositions, the fact that these individuals have ultimately come to a resolution on discovery, duplicative discovery is really not an issue anymore as our evidence will show the Court because the parties are working efficiently together. And because that is the undisputed evidence that is before the Court, the central issue is, because this litigation has been around for a very long time, it is unquestionably mature from a standpoint of pretrial proceedings.

Will it set the litigation back to institute MDL proceedings, or will it move the ball forward? I need to take a break from my multidistrict litigation criteria to tell the Court that, again, because this is a new rule, the rule does not

establish for us the burden. It doesn't tell us much about the evidentiary standard.

I certainly will propose that it's Union Carbide's burden to meet these criteria and Union Carbide's burden to bring evidence. And in that regard, under Rule 13, we have challenged, as we must, the factual statements contained within their brief. And once we did that, we think the rule makes it clear that they then need to do something more than allege a convenient -- a convenience could be enjoyed by a Rule 13 proceeding. They need to do something more than allege a party would be benefitted or that a witness would be benefitted or allege that they think that would happen. They need to bring you something tangible that a concrete result could be enjoyed, because otherwise, you are in a position of guessing with them about the chaos that could be caused by an MDL proceeding.

I also want to say that because the criteria are similar between Rule 13 and Rule 11, there is a fallback position that this Court can consider. This Court can say: Since Union Carbide has waited five years to ask for consolidated pretrial proceedings of a formal nature and relied instead on informal pretrial consolidation in particular areas,

in particular counties, because they've waited this long and they've combined all of these motions together, and now it appears there will be consolidation in the Fourth Administrative Region, instead of believing that Union Carbide's wishes or fears or hopes can come true about what an MDL could do for you, you can wait and see what the Rule 11 proceedings yield. If efficiency is promoted, if there is some convenience that is enjoyed by a Rule 11 or multiple Rule 11 proceedings, then that's a tangible piece of evidence that this Court can consider at a later time.

So the fallback position that this Court could entertain today, is that because there are so few cases, because the proceedings that will be undertaken by the Rule 13 judge are very similar to what the Rule 11 judge would be doing, creating a liaison committee, creating master discovery, because there are some objectives that will be furthered by the Rule 11 court that would also be instituted by the Rule 13, you can wait and see. You don't have to believe the plaintiffs that it's going to cause chaos, we feel certain that it will cause, because of the standing system that we've got in place that's been working so well.

And you don't have to believe the defendants. You can say, "There's not enough cases to warrant it at this time," because that, under the MDL statute, is a factor as well, just not enough cases pending to warrant that. And you can play the waiting game, as it were, to see who's going to be right, and then you'll have tangible evidence. So let me return to the MDL criteria.

As I've said, if the litigation has been pending for a substantial period of time, that is a fundamental criteria that these cases will show the Court is considered by the MDL court. And the MDL court frequently denies multidistrict litigation treatment when a litigation has been ongoing for a substantial period of time, and pretrial proceedings are well down the road.

My colleagues will outline for the Court that pretrial proceedings are not only well down the road, this has become a routine. Pretrial has become a routine matter for these litigants. I won't tell you that there's never a new issue any more than I will tell you that trial doesn't bring some new issues. But there's nothing about an MDL judge participating in this proceeding that is going to take the uniqueness out of each piece of litigation. It's

called due process.

Plaintiffs are entitled to their day in court, and every trial is going to look different. So you cannot achieve the type of uniformity that Union Carbide hopes will come with an MDL proceeding simply by placing an MDL judge in place. Even with the MDL criteria that you have under this rule, under Rule 13, the rule itself acknowledges that the trial judge is going to have something to do. The trial judge's job is not done when the case is remanded. There are still factors that can change in litigation because trial work is not static.

Similar to the first factor, which is how long the litigation has been going on, is how well has it been working? Have these litigants been working well together? The things that the movant hopes to achieve by a Rule 13 proceeding, can they -- have they been achieving it in other ways?

Well, that's the most important thing the Court will hear from my colleagues today is, in fact, things are working pretty well for the size of the litigation that we have; even the defendants have agreed. It's not broken.

In the prior proceedings that we've had that we've attached to the Court's copies of our

filings, we attached the transcript where they've indicated that really once you boil it down to what they really want uniformity on, it's evidentiary rulings, the evidentiary rulings that are going to be up to the trial judge, not the Rule 13 judge.

So they are not going to be able to achieve -- which is the standard: Can they achieve the goal they're searching for with this Rule 13 proceeding, and how well are things working?

Well, things are working very well. And the fact that there are differences in the standing orders from county to county to county, you haven't heard that that's causing a problem. There are just differences. And I can tell you that it must not be a problem that is of significance to Union Carbide because they're willing to say that the appointment of eight separate Rule 11 judges, and clearly the eight separate rulings that they could stand to obtain on these individual issues, that's not going to be a problem.

My experience in the MDL is in every administrative region, the standing order is a bit different. The standing discovery is a bit different. We still have to be lawyers. We cannot reduce this to a forum practice. And there's nothing in the MDL

Rule 13, just as there's nothing in Section 1407, that says that we put this litigation on autopilot. It can't be done. But it is working. This is not broken. And once they admit that it's not broken, they have admitted MDL Factor No. 2: That the maturity of the tort reflects the underlying agreements that are ongoing by the parties.

Another factor is: Will the transfer to an MDL court avoid the conflict in rulings? Well, again, that's my primary problem with Union Carbide trying to take this Rule 13 motion out of the context of the other things they've asked for. Because if the appointment of a Rule 13 judge in the absence of Rule 11 would create uniformity in a ruling, I might -- that might be a harder problem for me.

If there wasn't anything in Texas jurisprudence that gave us Rule 11, if we didn't have any of that and all we had was Rule 13, then I would have a tougher row to hoe convincing you that I can't get uniformity in decisions with one judge. But I think I could still do it with the issues that they are raising for you, because they have not raised a single common issue that they would really like to press before the Rule 13 judge that doesn't have an evidentiary foundation. And where there is an

evidentiary foundation to a ruling, there is a capability for a difference in a ruling.

Mr. Tipps mentioned that there is a bulk supplier case that is before the Texas Supreme Court right now. Actually, there are two. And the reason that's important is because those cases represent the opposite ends of the spectrum for a bulk supplier. You've got a completely sophisticated -- I shouldn't be saying that. There's the argument that there is a very sophisticated work -- employer that was receiving the information from the bulk supplier. On the other hand, in the other case, the evidence is a completely inexperienced workplace. If they weren't told about the hazards, they didn't know.

The adequacy of the warning, is the warning going to be identical in each case? It never is. So if -- the sophistication of the individual to whom the warning is provided and the actual warning itself are two evidentiary questions that create a record and a possibility for a different ruling, as they do in the two bulk supplier cases that are before the Supreme Court right now.

JUSTICE KIDD: What are the names or the citations of the two cases?

MS. MCCALLY: I'm going to do the best

that I can. I may have the names in my brief.

JUSTICE KIDD: One is *Gomez*?

MS. MCCALLY: One is *Humble Sand & Gravel v. Gomez*, and the other one is the *Tompkins* case.

JUSTICE KIDD: Well, that's close enough.

MS. MCCALLY: So the *Tompkins* case. The *Humble Sand & Gravel* case has already been argued to the Texas Supreme Court, so that is utterly ripe, and full briefing has already been accomplished in the *Tompkins* case. So there is really not much for the MDL court to do on that front, because the question of how the bulk supplier doctrine is going to be applied in the state of Texas is sure to be resolved by either Case A or Case B. And if both cases are actually addressed by the Texas Supreme Court, then we'll actually know the spectrum of how that doctrine will be applied in the state of Texas.

And they haven't brought you, the juror, they have not brought you another issue that could quickly be considered by the MDL court that won't be decided by the Rule 11 courts first. If the litigation is so fully ripe in the cases that were filed before September the 1st of 2003, why is it more

appropriate for a Rule 13 judge on 30-day or 60-day-old cases to be deciding the issues that have been raised by Union Carbide? And can they avoid a conflict in rulings between the Rule 13 judges and the Rule -- the Rule 13 judge and the Rule 11 judges? They cannot.

As much as they would like to read into the new Rule 11 and as it's coordinated with Rule 13, the threshold of coordination between the judges that are appointed for pretrial consolidation is no greater than it ever has been before, and that threshold is consult. The Rule 11 judges consult with the Rule 13 judge just as the Rule 11 judges consult with one another.

The legislature demonstrated in the Government Code, and the Supreme Court demonstrated in its translation of the Government Code to Rule 13, that it knows how to write a statute that says: "You're bound." Because part of Rule 13 says that the MDL judge's decisions on certain issues are binding on the trial judge absent special circumstances. So we know how the rule looks when a decision is binding. They don't use the word "consult" when they mean to bind.

The consultation is a coordination.

It's a sharing of information, and it's the kind of thing that's been going on in Rule 11 proceedings all along. And yet, there are divergent rulings from Rule 11 judge to Rule 11 judge. It happens frequently. And, again, sometimes it's because of the evidentiary record that is presented to those courts. So the third factor cannot be satisfied. They cannot achieve complete uniformity in their rulings.

And I have to take one break to say I think if the Court looks very carefully at the record that they have provided to you, you'll see they haven't provided you with conflicting rulings even in the record they give you. For example, one of the rulings that they cite as a conflict is a privilege ruling. They say that one judge granted their privilege objection and another judge did not.

Actually, the transcript that they've provided to you shows that the lawyer didn't show up with his evidentiary basis to sustain that privilege objection, and so the judge said, "I'm going to have to deny that for now. Give me your affidavits." It's not a conflict. That's a judge doing his job. He's not supposed to simply say, "Well, you satisfied your evidentiary burden in one proceeding, but you didn't here."

So as long as you've got more than one judge deciding issues, and you're going to, and you cannot achieve no conflicts or no divergent views, it's called discretion. And because of the maturity of the tort -- and, again, I go back to the maturity of the tort because it's a factor that the Court has to consider. Because of the maturity of the tort, none of these issues are going to be new in the Rule 13 proceeding. The Rule 13 judge is not going to be deciding any issues as a question of first impression, because these are all going to be litigated over in the Rule 11 or the non-Rule 11 administrative regions.

JUSTICE HANKS: Ms. McCally, I have a question. Isn't it true that after July 1st with the changes in the recording of the responsibility rules, that you're going to have parties now, responsible third parties who are going to be bankrupt defendants, defendants who aren't subject to the court's litigation -- court's jurisdiction?

So isn't it true that the complexion of those cases are going to change, and they're going to be different and new issues that the trial court is going to be looking at?

MS. MCCALLY: Yes and no, Your Honor.

Yes, I do think the complexion of the case will change, but, no, I don't think that is in any way a factor that the Court needs to be concerned about. Because as my colleagues are going to discuss in terms of the history of asbestos, the bankruptcy of asbestos litigants is nothing new, and it's nothing new that there are shades and phases of litigation. Every plaintiff is different. Specific causation with every plaintiff is going to be different.

The law is going to change every two years. The law has changed every two years for the last 25 years of asbestos litigation, and we've already run the cycle on all of those new laws. They didn't like the forum non conveniens law, and so they lobbied and had that changed several years ago. And now, even 71.052 has gone up through the Texas Supreme Court. So I'm really the one that's standing here, Judge, and telling you that this litigation will never be static, but the parties have always worked through that with a great deal of agreement.

The unique issues of specific plaintiff to plaintiff to plaintiff are always going to be a problem, and it's not a problem that can be solved by Rule 13, and it's really not a problem that can be solved by Rule 11 either. But it's not even a

problem. That's what's absent in these proceedings is some identification of a problem. But the litigation will never be static. We can count on that.

But the question is: Whether or not the appointment of a Rule 13 judge will promote a just and efficient conduct of the litigation? Will it cause the litigation to be static? It can't because, again, specific causation will have to be decided, a new defendant will go bankrupt, and somebody will have some more questions in discovery to ask in every new case. There will be a new nuance. There will be a new question.

I think there's always been third-party potential responsibility. I think it's been in tort reform for the last five or six years. So they could have, and probably should have, sent their discovery on a potentially responsible third party a long time ago. That they're just now getting around to asking other defendants questions about their potential responsibility is not a basis for a Rule 13 judge.

JUDGE PEEPLES: Let me say you've used 25 minutes.

MS. MCCALLY: Yes, Your Honor. And then I need to wrap up because my colleagues have things that are very important to tell the Court. And

I've already discussed the fourth factor, whether not the transfer of these cases will hasten or the litigation.

The important things that you're going to hear from my colleagues is that we have tangible evidence that there will be delay. We have tangible evidence because of the history of this litigation. We have tangible evidence of what that delay is going to mean to the individuals that have been harmed by asbestos. So their hopes that delay -- that there will be no delay, their hope that litigation will be hastened, again, is not backed up by any evidence that has been presented to this Court.

And I would also like to say -- I know the Court has indicated that Union Carbide will be opening and closing. But, again, I'm placed in a very precarious position because it is -- it is our position that Union Carbide bears the burden of proof. It is our position that it is Union Carbide that has to come forward and persuade the Court not with argument, but with evidence.

As the record stands right now, although they have shown you a lot of paper, they have not identified a single witness. They have not identified a single party that will be -- whose

convenience will be served by these proceedings. So the record, as it stands right now, is they don't have the evidence they need in order to meet their burden under Rule 13.

But if in the argument today -- and I'm like Mr. Tipps. I'm caught between an appellate court and a trial court. If through their arguments they attempt to introduce judicial admissions of lawyers, if they attempt to make this an evidentiary presentation through the arguments of counsel, we request that the Court consider giving us at least an opportunity to rebut those factual statements.

Thank you.

RESPONDENTS' ARGUMENT BY MR. RUSSELL BUDD

MR. BUDD: May it please the Court. My name is Russell Budd, and I represent asbestos claimants with cases across the state.

And I would just take judicial notice that this is an awfully big crowd for three cases. The size of the crowd, I think, does belie the statements of counsel at the beginning of his argument, that this is really just about three cases that they have filed a Rule 13 pleading in to seek the efficient administration in those cases over the next eight months. In fact, in their pleadings, they say

that they hope that there will be the appointment of one judge for all cases throughout the state of Texas, and that, quote, with that procedure, virtually all pending and future related asbestos cases could be brought within the jurisdiction of a single judge, and the benefits of statewide consolidation and coordination could be achieved immediately. And I think that's really what this is about.

In fact, in the Rule 11 regional hearings that we've had, in fact, the one that we had several weeks ago in Brownsville, Mr. Tipps admitted that Rule 11 consolidation in this context really didn't make any sense in the absence of Rule 13. That ultimately is the big picture plan that Union Carbide has for this litigation. And clearly, I think Ms. McCally has outlined why that can't happen, why Rule 13 doesn't allow for that to happen. But I would like to go through some of the history perhaps in the context of asbestos litigation to help discuss the issue of why I think that would be a very bad idea.

First, I've got basically three points to discuss; and that is, that the present system is far superior frankly than to any that I think that has been devised so far in the country. Secondly, that if there is any new forum that is created for literally

30,000 cases, it will create a massive incent[illegible] hundreds of defendants and some plaintiffs to relitigate all the issues all over again, there reducing resolution of the claims. And then f[illegible] that the conditions that Union Carbide says ex[illegible]d that require statewide consolidation, in fact, d[illegible]ot exist.

I've litigated asbestos claims fo[illegible] people exposed to asbestos for approximately 20 - 25 years now probably in 20 states, and frankly, I do not think that there is a better system statewide f[illegible]the resolution of claims than the one that has been developed in Texas.

As the Court is probably aware, the first asbestos case was filed in the state of Texas in 1967. I think that may be a record for mature mass tort litigation. The first significant appellate decision, *Borel v. Fibreboard,* was issued by the Fifth Circuit Court of Appeals from a Texas trial court -- appealed from a Texas trial court in 1973. Probably Texas has the most vast body of case law -- judicial case law in asbestos. And we probably have one of the more significant caseloads in the state of Texas, and we've been doing it now for 36 years. That it has developed into a highly satisfactory judicial

machinery for the resolution of asbestos claims is hardly surprising.

Now, to have me say that this is the best system ever, a cynic would probably think I had some kind of sweetheart deal going on in Dallas County. First of all, I am in front of a conservative Republican judge who is our asbestos judge that handles all of the common issues, whose decisions are reviewed by a conservative, completely Republican panel of the Court of Appeals, whose decisions are reviewed by the Texas Court -- the Texas Supreme Court. More claims have been resolved there probably in Dallas County and in Houston County than in any other place in the state. The vast majority of those claims are resolved in those two jurisdictions.

It's hardly the stuff of which judicial hell holes are made. It is a place where defendants seem to feel that their arguments are heard and that their concerns are heard satisfactorily, and it's not a situation where either side gets everything they want. But there is a system of settled expectations that has arisen over many, many years that results in high resolution rates on claims, very few trials, and frankly at this point, very few hearings on virtually any issue. It wasn't always that way.

This litigation started out in federal court back in the late 1970s in Texas, that I was involved in at least, and in that time frame, most of those claims were in federal court through the late 1980s. At the beginning when I was involved in these cases early on, the cases were tried one by one. There were credible litigation battles that went on. There were groups like we have in the courtroom today for simple hearings over motions in limine. Every case was tried. Very few cases were settled, and very few cases were totally resolved.

Over time, in the federal court system through the 1980s, those issues gradually resolved. There was very, very little in the way of litigation activity and hearings and discovery that took place in the late 1980s because all of those issues had been formally resolved through the trial courts and the appellate courts. And gradually, cases reached a very high resolution rate, very few hearings, very little discovery. And the federal judges finally said, "This is crazy. Why are we doing this with all of these cases throughout the entire country in all of these courts? We need an endgame resolution of this litigation ultimately."

The plaintiffs were so convinced that

there needed to be an endgame resolution to
all the cases, and the defendants became con
that. And the game plan was that there would
federal MDL appointed. Virtually all of the
lobbied heavily for that, so that that could
prelude to a global resolution of all the case
through a mass class action settlement of all
asbestos claims.

The MDL judge was appointed, Ju
Charles Weiner from the Eastern District of
Pennsylvania. And just on the heels of that,
action settlement was filed in the Eastern Dist
The class was certified. There were objectors.
objectors appealed the class settlement to the T
Circuit. The Third Circuit overruled it becaus
failed to adequately notify future claimants. T
Supreme Court ultimately heard the case and af
the Third Circuit and essentially killed the pi
dream that there would be a judicial class acti
settlement of all asbestos claims forever.

So losing its purpose, the fede
quickly became a nightmarish black hole for asb
litigants. To this day, there's not one plaint
counsel in this room that would purposefully f
their claim in federal court. They know that

go into the federal MDL and never see the light of day again. To this day, every one of the defendants in this room -- every one of the defendants represented in this room see that as something that's desirable because they will not have to pay those claims. Consequently, the federal MDL failed to achieve any relevance after the early 1980s.

Consequently, since federal court was no longer an option, virtually all of the claims in Texas began to be filed in the state courts. When they were filed in the state courts, we had litigation of issues occur all over. Every issue that had been resolved in federal court was completely relitigated. We had trials. We had hearings. We had discovery. And it was chaos, and out of that chaos grew the concept of standing orders in each of the counties that had significant asbestos litigation in the state of Texas.

In Dallas County, originally, I think we had -- Judge Bill Rhea was the asbestos judge, and ultimately, the parties negotiated a standing order that helped resolve many of the scheduling issues. Judge Rhea was appointed to hear all of the common issues as they relate to -- as they related to asbestos litigation generally. This happened in

Houston. This happened in Fort Worth, Austin, a variety of places all across the state. Literally, hundreds of issues were resolved by the asbestos judges in the early and mid-1990s.

Gradually, the same pattern in state court happened as did in federal court. The litigation of those issues tailed off, and, ultimately, the parties had settled expectations as to what they could perceive in the way of a ruling, and they simply no longer brought the motions anymore. The discovery gradually calmed down, and the trials gradually calmed down.

The -- in fact, the situation in Dallas is such now that we probably have -- I think there's somewhere in the range of 150 cases that are set for trial in the early part of the year -- some hundreds of cases set for trial in the early part of the year. They canceled the asbestos common-issues dockets in Dallas County for the last two months because there haven't been any common issues heard. There's nothing scheduled, so there's no reason to have a common-issues docket.

In Houston, they had a standing order and a common-issues judge. Three years ago, I'm told, they canceled the common-issues calendar altogether

because there were no common issues. These [illegible] have been resolved. The parties' expectatio[illegible] settled. And when you resolve the issues -- [illegible] resolve the litigation of the issues and the [illegible] expectations are settled, the resolution of [illegible] goes through the roof. When you start relitig[illegible] issues and relitigating old issues all over ag[illegible] resolution of claims is reduced.

The -- today, thousands of case[illegible] settled throughout the state of Texas, again, w[illegible] very, very little in the way of conflict on m[illegible] substantive issues. The Union Carbide counsel [illegible] Brownsville hearing, Mr. Powers, admitted to th[illegible] that 99 percent of all cases in the state of Texas are settled, and 99 percent of all issues are resolved by agreement of counsel. That is outstanding for a litigation that encompasses 30,000 approximately -- nobody knows the exact number, but I would think a fair guess of asbestos litigation in the state of Texas is about 30,000 cases. That is outstanding that we have reached that level of resolution in a litigation that is that major.

The -- I think that the big issue here is: What would happen if Union Carbide got what it really seeks here, which is a statewide consol[illegible]?

If there's a new forum, all issues will be relitigated, and there are hundreds. They brought up one, two, three issues that they've talked about here today.

There are hundreds, literally hundreds of these asbestos judges across the state of Texas resolving everything from motions in limine to whether plant work or evidence comes in on punitive damages, and just a variety of different things that ultimately we've all heard before, but we will all hear again if there is a new forum within which to litigate it because hope springs eternal; that, once again, we might have our day in front of a new court.

JUDGE PEEPLES: Mr. Budd, let me ask you.

MR. BUDD: Yes, sir.

JUDGE PEEPLES: Why would it be more likely for there to be relitigation of the issues with a pretrial judge than if you filed a case in Austin or wherever in front of some judge that you hadn't been before? I mean, why would a pretrial court be more apt to relitigate and reopen everything than some other judge somewhere else?

MR. BUDD: Well, I think that the -- if you can relitigate an issue and have it apply to

30,000 cases, it has some real power to it. It -- the hope springs eternal argument takes on some real power if you can multiply a victory over 30,000 cases. If you've got one case, you're applying it to -- well, maybe they might bring it up with a new judge in a rural county, for example, but -- and that does happen.

JUDGE PEEPLES: Would that not work both ways?

MR. BUDD: Sure, it certainly could. It certainly could. And as I said I think in my argument, the defendants will do it, and some plaintiffs undoubtedly will try to do it. No question about that. But, again, we have a state of relative judicial equilibrium here that I would argue shouldn't be disturbed in the hope that we might have a better system.

JUSTICE KIDD: I take it that in the standing-order counties, you have an asbestos judge that is assigned; is that right?

MR. BUDD: Yes, sir.

JUSTICE KIDD: And I guess that judge changes from time to time?

MR. BUDD: Yes.

JUSTICE KIDD: Who is it in Dallas?

MR. BUDD: The present judge is Judge Gary Hall, who is a retired judge who's sitting as the asbestos judge.

JUSTICE KIDD: And he's continued to do the asbestos work in Dallas?

MR. BUDD: Yes. And I think he's been doing that now for some time, for some years now.

JUSTICE KIDD: How about in Houston?

MR. BUDD: Sharon? Scott?

MS. MCCALLY: Jeff Brown.

MR. BUDD: Jeff Brown.

JUSTICE KIDD: And then is there any new move to have standing orders in Galveston County and Brazoria County?

MR. BUDD: Well, we have cases in both of those jurisdictions. Frankly, until they brought their motion, I didn't realize that they felt there was a need for one. Certainly we would be glad to sit down and negotiate one for them that is similar to any of the other counties.

JUSTICE KIDD: There's been no move to have standing orders there?

MR. BUDD: Not that I'm aware of, Judge.

The -- again, I do think -- and the

issue of common judges -- I'm sorry -- the issue of common issues is probably the main argument Union Carbide makes. But, again, I think that argument is belied by the absence of any attempt to get common issues resolved by them across the state of Texas. It simply rarely, if ever, occurs. They don't -- they haven't attempted in the entire federal MDL in 13 years to get any common issues resolved.

And I think they -- the argument I've heard heretofore is, "Well, Union Carbide really has only been involved in a major way in the litigation over the past couple of years." But, in fact, they have been an active litigant for at least 20 years. This John Myers, whose deposition they complain about having to do over again, is a deposition witness that has been deposed as a Union Carbide representative for 20 years, and they have never sought any protection for Mr. Myers or any other common issue in the federal MDL.

We have cases in Georgia as well. We have essentially one major county, Fulton County, that hears those cases, and they've yet to bring a common-issues argument before that asbestos judge in thousands of cases. So, again, I think the real -- the real issue here is not the common issue. The real

issue are -- the real issues are the individual issues because the individual issues are what comprise 99.9 percent of everything these lawyers in this room do on a daily basis. Discovery, hearings, trials, whatever you have with respect to an asbestos case, 99 percent, if not more, is individual to each case.

And think of the burden of one judge, the crushing burden that you would have of one judge having to hear all of the individual issues that would affect 30,000 cases. It's about like putting the Austin water supply through a garden hose. It's likely to back up. It's likely to break down.

And who would benefit from a breakdown in the system? It certainly wouldn't be my clients. My clients currently are receiving judicial resolution of their claims well within the Supreme Court guidelines for having some of the cases resolved.

I think also another argument that's made by Union Carbide is that this MDL process -- they certainly made it in the Rule 11 motions -- that some sort of statewide consolidation would be -- have a salutary, some sort of global resolution of asbestos claims across the state of Texas. But, again, we've sought global resolution with Union Carbide and Dow -- they're the parent -- and have been rebuffed in those

attempts. I sincerely don't think that that is the ultimate goal of Union Carbide here.

It's perfectly clear that there isn't any mechanism judicially to settle claims anymore. If Union Carbide wants to settle claims, they can settle claims just as have many of the other major defendants across the country. Some of them have settled all cases across the country, Halliburton and Honeywell being two of the most significant.

I think the real issue here is delay. I think there is a major national strategy on behalf of Dow and Union Carbide to find any way to slow down the pace of the claims. This is part and parcel of that strategy, and it's coordinated. And I think ultimately, a federal type MDL statewide of 30,000 claims to be forced on one judge would ultimately issue that result for them.

So in summary, I think that the MDL process is not as severe a process for the settlement of these claims. I think the vast majority -- again, I think literally 99 percent of all issues are individual in these cases, not common. I think that Union Carbide clearly has not availed itself of less drastic remedies, for example, seeking a negotiated resolution of standing orders with counsel in counties

where they don't have any.

I think that the MDL will result in the increase in litigation of issues, which my experience has found results in a decrease in the actual resolution of claims, and I certainly don't think that an MDL process will result in a global settlement resolution of all of these claims.

JUDGE PEEPLES: You mentioned the figure 30,000. You're referring to the old cases, aren't you?

MR. BUDD: I'm referring to the old cases. And, again, I think that's -- in their motion at least, they're talking about a statewide resolution here of all three post-September 1.

JUDGE PEEPLES: But our decision in this proceeding involves the 3, plus 20 some-odd tagalong cases, and I guess those cases too?

MR. BUDD: That's right.

JUDGE PEEPLES: Now, how many of those plaintiffs are involved in those cases if they're multiple? Does anybody know?

MR. BUDD: It's a --

JUDGE PEEPLES: Eight or ten maybe?

MR. BUDD: It's a handful. It's not -- it's not many.

JUDGE PEEPLES: Okay.

JUSTICE LANG: May I ask a question?

MR. BUDD: Yes, sir.

JUSTICE LANG: Is there any projection or crystal ball estimate of whether these cases will continue to be filed in a significant way in the future? That's really coming on the heels of Judge Peeples' question.

What are we looking at for the numbers that we might have to deal with, assuming they were transferred or not?

MR. BUDD: Your Honor, I think the number of claims filings has decreased since 1995 or so. I think that's a function of various things, including state law and just epidemiology of asbestos disease. I think we're now seeing the tailing off of asbestos disease. All predictions have been wrong on the number of asbestos claims over years into the future. So anything I say, I'm sure I would be wrong about.

I think people will continue to file asbestos claims. And over time, I think it will be some amount less than was filed in the past, but there will be thousands. I have no doubt that there will be thousands.

JUSTICE LANG: Have there been any studies that academics have made or scientists have made that might be authoritative that we could hear about it?

MR. BUDD: I certainly can -- yes, I think there are some. And I -- there, for example, in some of the asbestos bankruptcies, experts are hired to project claims over the next 30 years so that the bankruptcy trusts can adequately provide for those future claimants. And I could probably find some of those numbers and be able to provide that to the Court. Unfortunately, that's not going to indicate how many are filed in Texas. It's going to be more of a national number.

And I say -- I say the number "30,000." That is a -- that is a roughly educated guess. I think that's somewhere in the range probably of what currently exists as active cases in the state of Texas.

JUSTICE LANG: Do we have any idea how mature those are in terms of what we've been talking about, like close to trial or --

MR. BUDD: Well, unfortunately, you know, there's probably about 25 to 50 asbestos firms that represent asbestos plaintiffs in the state, and

so it's very hard for me to tell what their experience is like. I can tell you from my experience that the majority of our claims are resolved I think within two years of filing them, which, again, for most jurisdictions -- for most litigation in a county like Dallas or Houston, it's a pretty good resolution rate.

JUDGE PEEPLES: Let's take a 15-minute break.

MR. GRIESEL: Everyone please rise.

MR. BUDD: Thank you.

(Recess from 10:21 a.m. to 10:36 a.m.)

MR. GRIESEL: Everybody please rise. Please be seated. May it please the Court. Mr. Mike Kaeske will begin presenting arguments.

RESPONDENTS' ARGUMENT BY MR. MIKE KAESKE

MR. KAESKE: May it please the Court. I'm Mike Kaeske. I represent plaintiffs in only the most catastrophic of asbestos-related diseases, mesothelioma cases and asbestos-related lung cancer cases. I represent 22 mesothelioma victims and their families and 4 asbestos-related lung cancer victims and their families whose cases are set in the next 8 months in Texas.

These 26 cases are 26 of the most significant asbestos death cases in the state.

They're 26 -- arguably 26 of the most significant physical injury cases in the state of Texas because mesothelioma doesn't have a cure. It's a death sentence, and the death is horrible and painful, often caused by suffocation from tumors growing outside of the body and crushing vital organs inside of the body. It invariably creates widows and orphans. These are people whose treating physicians told them that their disease was caused by asbestos exposure, and the defendants themselves rarely disagreed.

In mesothelioma cases, the question isn't whether the person has a disease or even what caused the person's disease. The question in mesothelioma cases is: Who caused the disease? Because Union Carbide is here today asking for a change of the well-established and efficient system that resolves and litigates these mesothelioma and other asbestos-related deaths in the state of Texas. It's for you-all, of course, to decide what is a just and efficient conduct in mesothelioma and other asbestos death cases and other asbestos cases in general.

In the last 4 years since I've opened my own law firm, I've been fortunate enough to have represented 49 individuals and their families in

asbestos death cases, almost exclusively mesothelioma cases. I want to describe for you what a just and efficient conduct in those cases has been.

Rudy Terry was born in Tyler, Texas. He served in World War II. He returned home and worked for 38 years at the Tyler Pipe plant. He was diagnosed with mesothelioma and given less than 12 months to live. I filed his case in Dallas on November 12th of 1999. Rudy was deposed within three months. His case was set for trial within nine months. Not a single dispositive motion was heard by the judge in the case. Scarcely any hearings were heard by the judge in the case. All issues were worked out by agreement of counsel. The case settled completely before trial. No jury was ever summoned. The case from the date of filing to date of resolution took ten months.

Rudy Terry lived to see the resolution of his lawsuit. What we -- and I say "we" because many of these lawyers in this room helped me to accomplish this. What we were able to do was allow Rudy Terry to die without having to worry about what was going to happen to his wife. Rudy Terry's case is absolutely typical of the 49 cases that I resolved in the last 4 years in the state of Texas. These cases

require almost no, if any, time from the trial courts.

Dispositive motions, if filed, are almost never heard because we all know what the likely outcome of those motions will be. Agreements are worked out among counsel. Like Mr. Powers -- wherever he is -- like Mr. Powers has already told the Court and Mr. Budd pointed out, 99 percent of all issues are resolved by agreement of counsel.

In only four of the cases that I resolved, were any motions for summary judgment heard, and all of those motions were heard and resolved in one hearing. None of those motions were filed by Union Carbide. In only five of my cases has Union Carbide filed any of these common-issue motions and never once have they set one for hearing. In not one of my cases has Union Carbide ever had one of their supposedly common-issues motions heard by a judge. And I've only deposed one Union Carbide corporate representative, and that deposition was done in many, many asbestos cases in conjunction with several different law firms.

My cases -- none of these 49 cases was tried to verdict. One case resolved in my case in chief. One case resolved after opening statements.